Supreme Court, U.S.
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No. 86-65

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

RICHARD J. McDONALD,

Petitioner,

vs.

ROSCOE L. EGGER, JR., COMMISSIONER OF DEPARTMENT OF INTERNAL REVENUE; AND LOCKHEED CORPORATION (aka) LOCKHEED CALIFORNIA COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT LOCKHEED'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an individual taxpayer can bring suit against his former employer and the Commmission of Internal Revenue for withholding taxes from his wages?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

Question Presented For Review..... i

List of Parties..... i

Table of Contents..... ii

Table of Authorities..... iii

Opinions Below..... 2

Statutes Involved..... 3

Statement of the Case..... 5

Reasons for Denying Petition..... 5

Conclusion and Request for Award Of Reasonable Attorney's Fees And Double Costs..... 14

Appendix A..... A-15

Appendix B..... B-21

Appendix C..... C-26

Certificate of Service..... 34

TABLE OF AUTHORITIES

Cases	Page
Bear Valley Mutual Water Co. v. Riddell 493 F.2d 948 (9th Cir. 1974)	11
Bob Jones University v. Simon, 416 U.S. 725 (1973)	10
Callow v. Amerace Corp., 681 F.2d 1242 (9th Cir. 1982)	11
Campbell v. Amax Coal Co., 610 F.2d 701 (10th Cir. 1979)	7-8
Chandler v. Perini Power Constructors, Inc., 520 F.Supp. 1152 (D.N. H. 1981)	7
Edgar v. Inland, 744 F.2d 1276 (7th Cir. 1984)	10
Enochs v. William Packing & Navigation Co., 370 U.S. 1 (1962)	10
Maxfield v. U.S. Postal Service, 752 F.2d 433 (9th Cir. 1984)	7,10, 11,12
Stonecipher v. Bray, 653 F.2d 398 (9th Cir. 1981)	10
U.S. v. Annunziato, 643 F.2d 676 (9th Cir. 1981)	7
U.S. v. Roberts, 425 F.Supp. 1281 (D.C. Del. 1977)	7

Statutes	Page
26 U.S.C. §3402(a)(1).....	3, 12
26 U.S.C. §3403.....	4, 12
26 U.S.C. §7421(a).....	4, 9
26 U.S.C. §7422(a).....	4, 11
28 U.S.C. §1927.....	14
Rules	
Supreme Court Rule 17.....	5, 6
Supreme Court Rule 17.1(a).....	6
Supreme Court Rule 17.1(b).....	6, 7
Supreme Court Rule 17.1(c).....	7
Supreme Court Rule 21.5.....	8
Supreme Court Rule 50.7.....	14
Federal Rules of Civil Procedure Rule 11.....	14

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Respondent, LOCKHEED, respectfully submits that McDONALD's Petition for Writ of Certiorari should be denied.

OPINIONS BELOW

The District Court entered its Order Dismissing Complaint For Want Of Subject Matter Jurisdiction and Denying Defendant's Request For Attorney's Fees Or Other Sanctions on April 3, 1985. A copy of the Order is attached as Respondent's Appendix A. It was not reported.

The District Court entered its Order Denying Plaintiff's Motion For Reconsideration of Dismissal on April 30, 1986. A copy of the Order is attached as Respondent's Appendix B.

The Court of Appeals entered its Memorandum Decision Affirming Respondent's Motion To Dismiss on March 12, 1986. A copy of the Memorandum is attached as Respondent's Appendix C. It was not reported.

The Court of Appeals entered its Order

Denying Petitioner's Petition for Rehearing and Rejecting the en banc suggestion on May 6, 1986. Petitioner's Appendix C.

STATUTES INVOLVED

1. 26 U.S.C. §3402(a)(1)

> "Except as otherwise provided in this section, every employer making payment of wages shall deduct and withhold upon such wages a tax determined in accordance with tables or computational procedures prescribed by the Secretary. Any tables or procedures subscribed under this paragraph shall - (A) apply with respect to the amount of wages paid during such periods as the Secretary may prescribe, and (B) be in such form, and provide for such amounts to be deducted and withheld, as the Secretary determines to be most appropriate to carry out the purposes of this chapter and to reflect the provisions of chapter

1 applicable to such periods."

2. 26 U.S.C. §3403

"The employer shall be liable for payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment."

3. 26 U.S.C. §7421(a)

"Except as provided in sections 6212(a)and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b)(1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

4. 26 U.S.C. §7422(a)

"No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund

or credit has been duly filed with the Secretary or his delegate, according to the provisions of law in that regard, and the regulations of the Secretary or his delegate established in pursuance thereof."

STATEMENT OF THE CASE

The facts of the case are stated fully in the decisions of the District Court (respondent's Appendix A at pp. 15-16) and the Court of Appeals (respondent's Appendix C at pp. 27-28).

REASONS FOR DENYING PETITION

Under Supreme Court Rule 17, "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor." McDonald's action against the

Commission of Internal Revenue Service ("the Commission") and Lockheed Corporation ("Lockheed"), his employer, does not meet any of the grounds for Supreme Court review under Supreme Court Rule 17. This is not a case where there is a conflict between decisions in the Court of Appeals, nor is it a case where there is a conflict between a Court of Appeals and a decision of a state court of last resort. Supreme Court Rule 17.1(a) and (b). This is not a case where a court of appeals departed from the accepted and usual course of judicial proceedings or sanctioned the lower court's departure from the usual course of proceedings. Supreme Court Rule 17.1(a). This is not a case where there is a conflict between two state courts on a federal question decision. Supreme Court Rule

17.1(b). This is not a case where a court has decided a federal question in conflict with the applicable decisions of this Court. Supreme Court Rule 17.1(c).

McDonald implicitly argues that this is a case of first impression, or at least different from all prior cited cases. Petition for Certiorari at p. 11. Nothing could be further from the truth. Similar if not identical lawsuits have been brought and lost by droves of taxpayers in published opinions during recent years, e.g., Maxfield v. U.S. Postal Service, 752 F.2d 433 (9th Cir. 1984); Chandler v. Perini Power Constructors, Inc., 520 F.Supp. 1152 (D.N.H. 1981); U.S. v. Roberts, 425 F.Supp. 1281 (D.C. Del. 1977); U.S. v. Annunziato, 643 F.2d 676 (9th Cir. 1981), cert. denied, 452 U.S. 966, 101 S.Ct. 3921, 69 L.Ed.2d 979; Campbell v.

Amax Coal Co., 610 F.2d 701 (10th Cir. 1979).

McDonald apparently argues that his petition addresses an important and perhaps recurring question that should be reviewed by this Court. Petition for Certiorari at p. 11. In response, Lockheed submits that this Court should deny McDonald's Petition since: (1) it is nearly impossible to identify the legal issues raised by McDonald's Petition and (2) the lower courts were plainly right in their application of federal law to this case.

Under Supreme Court Rule 21.5,

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

It is nearly impossible to identify or

to understand "the points requiring consideration" in McDonald's Petition. Rather than presenting these points with "accuracy, brevity and clearness," McDonald makes broad, sweeping statements and quotes seemingly irrelevant passages from cases, Petition at pp. 9-14, and quotations famous orators, e.g., Patrick Henry's "Give me liberty or give me death.", Petition at p. 15.

The Court of Appeals was plainly right in finding that McDonald was barred from bringing his claim against Lockheed for withholding taxes from his salary. Respondent's Appendix C, p. 31.

McDonald's attempt to enjoin the withholding of taxes from his salary is barred by 26 U.S.C.§7421(a) which prohibits any person from bringing a "suit for the purpose of restraining the assessment or

collection of any tax..." Maxfield, 752 F.2d at 434. The Ninth Circuit pointed out to McDonald that:

> "This prohibition, which has been in effect since 1867, Bob Jones University v. Simon, 416 U.S. 725, 731 N.6 (1973), is frequently applied to tax protests such as McDonald's. Maxfield v. U.S. Postal Service, 752 F.2d 433 (9th Cir. 1984); Stonecipher v. Bray, 653 F.2d 398, 400-401 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); Edgar v. Inland, 744 F.2d 1276, 1277 n.1 (7th Cir. 1984)."

Respondent's Appendix C at p. 29. An exception to this prohibition is made only where the taxpayer can show that (1) under no circumstances can the government ultimately prevail, and (2) the taxpayer will be irreparably harmed if the injunction is not granted. Enochs v. William Packing & Navigation Co., 370 U.S.

1, 782 S.Ct. 1128 8 L.Ed.2d 292 (1962).

The Ninth Circuit found that:

> "This exception does not apply here because the government is plainly right. McDonald argues that his wages are not subject to taxation because both the federal reserve system and withholding taxes are unconstitutional. However, the legality of the federal reserve system, see Callow v. Amerace Corp., 681 F.2d 1242 (9th Cir. 1982), and of the withholding tax, see Maxfield, 752 F.2d at 434, is settled law and McDonald's constitutional claim is grounded in nothing more than his philosophical assertion."

Respondent's Appendix C at p. 30.

26 U.S.C. §7422(a) requires that a claim for refund be filed with the Secretary of the Treasury as a jurisdictional prerequisite to a refund action. Bear Valley Mutual Water Co. v. Riddell, 493 F.2d 948, 951 (9th Cir. 1974). The Ninth Circuit affirmed the District

Court's finding that it lacked jurisdiction over McDonald's claim for a refund of all taxes withheld from his income since 1978, since McDonald did not file a claim with the Secretary of the Treasury. Respondent's Appendix C at pp. 30-31.

McDonald's action against Lockheed for withholding taxes is barred. Lockheed has no discretion and must follow IRS directives under 26 U.S.C. §3402(a)(1), Maxfield, 752 F.2d at 434. Lockheed is immune from suit for compliance with IRS directives under 26 U.S.C. §3403. Respondent's Appendix C at p. 31, and Respondent's Appendix A at pp. 19-20. 26 U.S.C. §3403 specifically states that:

> "The employer shall be liable [to the United States] for the payment of the tax required to be deducted and withheld under this chapter, and shall not be liable to any person for the amount of any such payment." (Explanatory material in

brackets added.)

See Respondent's Appendix C at p. 31.

In awarding sanctions against McDonald for bringing a frivolous appeal, the Ninth Circuit stated that:

> "McDonald's appeal placed a particularly unwarranted burden on Lockheed. However in-artfully formulated, his real quarrel was with the government, not his former employer. Lockheed clearly lacked discretion in the matter, and for McDonald to harrass another private party with repeated lawsuits to protest governmental policies is entirely improper as well as unfair."

Respondent's Appendix C at pp. 32-33.

The Ninth Circuit obviously found no merit in McDonald's argument that it is unconstitutional to require a citizen to obtain a social security number in order to gain lawful employment (McDonald's Petition for Certiorari at p. 8) since the Ninth

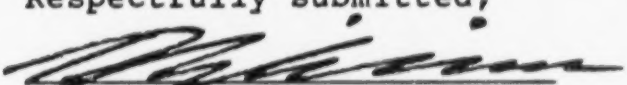
Circuit denied McDonald's Petition for Rehearing (Petitioner's Appendix C) which specifically set forth McDonald's "status" argument. Petitioner's Appendix B at pp. 2-3.

CONCLUSION AND REQUEST FOR AWARD OF REASONABLE ATTORNEY'S FEES AND DOUBLE COSTS

For the foregoing reasons Lockheed respectfully submits that the Petition for a Writ of Certiorari should be denied and that Lockheed should be awarded both reasonable attorney's fees and double costs pursuant to 28 U.S.C. §1927 and FRCP Rule 11, and Supreme Court Rule 50.7.

DATED: August 18, 1986

Respectfully submitted,



BENJAMIN GEORGE WILLIAMS
Attorney for Respondent
LOCKHEED CORPORATION

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD J. McDONALD,	)	No. CV 85-0702 AHS (Mcx)
Plaintiff,	)	ORDER DISMISSING COMPLAINT FOR WANT OF SUBJECT MATTER JURISDICTION AND DENYING DEFENDANTS' REQUESTS FOR ATTORNEY'S FEES OR OTHER SANCTIONS
v.	)	
ROSCOE EGGER, JR., COMMISSIONER OF INTERNAL REVENUE SERVICE AND LOCKHEED CORPORATION, ALSO KNOWN AS LOCKHEED CALIFORNIA COMPANY,	)	
Defendants.	)	

On January 30, 1985, Richard McDonald filed a complaint against Roscoe Egger, Junior, as Commissioner of the Internal Revenue Service, and Lockheed Corporation ("Lockheed"), alleging a civil conspiracy to defraud McDonald and to deprive him of various of his constitutional rights in connection with collection of federal income tax from his wages. Defendant

Lockheed moved on February 20, 1985 to dismiss the complaint for want of subject matter jurisdiction and for failure to state a claim, pursuant to Rule 12(b)(1) and (6), Fed.R.P. On March 5, 1985, defendant Egger moved on similar grounds to dismiss the complaint. Each defendant also requested sanctions for plaintiff's alleged filing of a frivolous claim. The motions were set for hearing by the Court on its April 8, 1985 calendar. After reading and considering the papers submitted in support of and in opposition to the motions, the Court finds this case to be appropriate for decision without oral argument (see Local Rule 7.11) and hereby grants both motions to dismiss and denies defendants' requests for attorney's fees or other sanctions.

Plaintiff asks this Court to grant him exemption from further participation in

the federal income tax systen, including "[g]ranting Plaintiff withdrawal as a right, from the Social Security System," and "[o]rdering the Internal Revenue Service to issue a written instrument stating that Plaintiff is not subject to, nor under the jurisdiction of the Internal Revenue Code by virtue of the Public Salary Tax Act." See Complaint, prayer, ¶¶1-7. This the Court cannot do. Title 26 U.S.C. §7421(a) prohibits taxpayers from bringing a "suit for the purpose of restraining the assessment or collection of any tax . . . ." This section is strictly enforced. Maxfield v. United States Postal Service, 752 F.2d 433, 434 (9th Cir. 1984). An exception to the strict rule of §7421(a) is made only where the taxpayer can show that (1) under no circumstances can the government ultimately prevail, and (2)

the taxpayer will be irreparably harmed if the injunction is not granted. Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). Plaintif clearly has not satisfied the first prong of this test. His sole grounds for requesting relief is that his participation in the income tax system is coerced, and that the system is unconstitutional. These claims are frivolous. Maxfield, 752 F2d at 434; Edwards v. Commissioner, 680 F.2d 1268, 1270 (9th Cir. 1982).

To the extent that the complaint can be read as a suit for refund (see Complaint, prayer, ¶5, it is similarly barred. Title 26 U.S.C. §7422(a) provides:

> No suit or proceeding shall be maintained in any court for the recovery of any internal

> revenue tax to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary [of the Internal Revenue Service]. . .

Compliance with this statute is a jurisdictional prerequisite to a refund action. Bear Valley Mutual Water Co. v. Riddell, 493 F.2d 948, 951 (9th Cir. 1974). In this case, there has been no claim for refund filed with the Secretary and there is consequently no jurisdiction in this Court.

Plaintiff's action against defendant Lockheed for withholding his wages is also barred. Lockheed had no discretion but to follow I.R.S. directives under 26 U.S.C. §3402 in withholding taxes from plaintiff's

pay. Maxfield, 752 F.2d at 434. Lockheed is immune from suit for its compliance. Id.; 26 U.S.C. §3403.

Defendants' requests for attorney's fees or other sanctions are denied. Although Lockheed asserts that it has repeatedly been forced to defend frivolous lawsuits brought by plaintiff, Lockheed has failed to proffer evidence of any prior action. See Decl. of Edward B. Reitkopp, at ¶3 (no "Exhibit 'A'" attached).

IT IS SO ORDERED.

IT IS SO FURTHER ORDERED that the Clerk shall serve, by United States mail, a copy of this Order on all parties or their counsel in this action.

Dated: April 3, 1985.

Alicemarie H. Stotler
United States District Judge

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RICHARD J. McDONALD, Plaintiff, v. ROSCOE EGGER, JR., COMMISSIONER OF INTERNAL REVENUE SERVICE AND LOCKHEED CORPORATION, ALSO KNOWN AS LOCKHEED CALIFORNIA COMPANY, Defendants.	)	No. CV 85-0702 AHS (Mcx) ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF DISMISSAL

On January 30, 1985, Richard McDonald filed a complaint against Roscoe Egger, Junior, as Commissioner of the Internal Revenue Service, and Lockheed Corporation ("Lockheed"), alleging a civil conspiracy to defraud McDonald and to deprive him of various of his constitutional rights in connection with collection of federal

income tax from his wages.

Defendant Lockheed moved on February 20, 1985 to dismiss the complaint for want of subject matter jurisdiction and for failure to state a claim, pursuant to Rule 12(b)(1) and (6), Fed.R.Civ.P. On March 5, 1985, defendant Egger moved to dismiss on similar grounds. Each defendant also requested sanctions for plaintiff's alleged filing of a frivolous claim. The motions were set for hearing by the Court on its April 8, 1985 calendar. After reading and considering the papers submitted in support of and in opposition to the motions, the Court dispensed with oral argument (see Local Rule 7.11), and, on April 3, 1985, granted both motions to dismiss and denied defendants' requests for attorney's fees or other sanctions.

On April 11, 1985 plaintiff filed a motion for reconsideration of the Court's order of dismissal. After considering plaintiff's moving papers, the Court concludes that no oral argument is necessary in this matter and denies plaintiff's motion.

Plaintiff's motion fails to comport with Local Rule 7.16, which provides:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party

> moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

Plaintiff has not presented any grounds on which reconsideration might be appropriate. Instead, he merely restates the substance of his opposition to the

original motions to dismiss. In granting the motions to dismiss, the Court considered fully these arguments and the facts upon which they are premised.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk shall serve, by United States mail, a copy of this Order on counsel for all parties in this matter.

Dated: April 30, 1985.

_____
Alicemarie H. Stotler
United States District Judge

APPENDIX C

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD J. McDONALD,	)	No. 85-5857
	)	
Plaintiff,	)	D.C. No. CV 85-0702AHS
v.	)	
ROSCOE EGGER, JR., COMMISSIONER OF INTERNAL REVENUE SERVICE AND LOCKHEED CORPORATION, ALSO KNOWN AS LOCKHEED CALIFORNIA COMPANY,	)	MEMORANDUM*
Defendants.	)	

Appeal from the United States District Court for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding
Submitted March 7, 1986**
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 21.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a) and Ninth Cir. R. 3(f).

Before: GOODWIN, WALLACE and KOZINSKI, Circuit Judges.

Richard McDonald appeals the dismissal of his suit against Roscoe L. Egger, Jr., the Commissioner of Internal Revenue, and Lockheed Corporation, his former employer, for an alleged conspiracy to violate his constitutional rights by forcing him to pay taxes.

Facts

Lockheed hired McDonald in June 1978, and, as a condition of employment, had him submit a W-4 form for social security withholding tax. After being audited by the IRS, McDonald filed a new W-4 claiming exemptions that the IRS subsequently found fraudulent. McDonald was then fined in an IRS administrative procedure.

On January 30, 1985, McDonald sued Lockheed and Egger in district court,

claiming that the withholding tax violated his constitutional rights. He asserted that defendants, acting under color of law, had conspired to subject him to an unconstitutional system of taxation. He requested that the district court order refund of taxes he paid since 1978 and to grant him immunity from future taxation. He also asked for $25,000 to cover the costs of his case.

Pursuant to Local Rule 7.11, the district court dismissed the complaint without oral argument on April 3, 1985. McDonald moved for reconsideration, which the court denied on April 30. A timely appeal was filed on May 9, 1985. Lockheed has moved for reasonable attorney's fees and double costs.

Discussion

1. McDonald's attempt to enjoin

withholding of taxes from his salary is barred by the Anti-Injunction Act which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . ... . ." 26 U.S.C. §7421(a). This prohibition, which has been in effect since 1867, Bob Jones University v. Simon, 416 U.S. 725, 731 n.6 (1973), is frequently applied to tax protests such as McDonald's. Maxfield v. United States Postal Service, 752 F.2d 433 (9th Cir. 1984); Stonecipher v. Bray, 653 F.2d 398, 400-01 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982); Edgar v. Inland Steel Co., 744 F.2d 1276, 1277 n.1 (7th Cir. 1984).

There is only one exception to the Anti-Injunction Act: where the taxpayer will suffer irreparable harm if the tax is not enjoined and the government cannot,

under any circumstances, ultimately prevail. Enochs v. Williams Packing Co., 370 U.S. 1, 7 (1962). This exception does not apply here because the government is plainly right. McDonald argues that his wages are not subject to taxation because both the federal reserve system and withholding taxes are unconstitutional. However, the legality of the federal reserve system, see Callow v. Amerace Corp., 681 F.2d 1242 (9th Cir. 1982), and of the withholding tax, see Maxfield, 752 F.2d at 434, is settled law and McDonald's constitutional claim is grounded in nothing more than his philosophical assertion.

2. The district court lacks jurisdiction over McDonald's claim for a refund of all taxes withheld from his income since 1978. Taxpayers must file their tax refund claims with the Secretary

of the Treasury before bringing a refund suit in district court. 26 U.S.C. §7422(a). This requirement is jurisdictional. Bear Valley Mutual Water Co. v. Riddell, 493 F.2d 948, 951 (9th Cir. 1974). McDonald has filed no claim with the Secretary and therefore may not maintain a refund.

3. McDonald's claim against Lockheed for withholding taxes from his salary is also without merit. Lockheed is required by U.S.C. §3402(a)(1) to follow IRS directives, Maxfield, 752 F.2d at 434, and, pursuant to 26 U.S.C. §3403, cannot be sued for complying with them. Maxfield, 752 F2d at 434.

4. Sanctions against McDonald are appropriate because this meritless appeal has imposed an unjustified burden on the court and on apellees. See Gattuso v.

Pecorella, 733 F.2d 709 (9th Cir. 1984). Despite overwhelming authority to the contrary, McDonald argues that withholding taxes violate his constitutional rights. The district court, dismissing the complaint, declared the claims frivolous, citing Maxfield, 752 F2d at 434. In a separate case brought by McDonald in state court to enjoin Lockheed from withholding taxes from his salary, the California Court of Appeal found McDonald's contentions frivolous and assessed costs against him. Appellant had ample reason to know that his appeal here would be found frivolous as well.

McDonald's appeal placed a particularly unwarranted burden on Lockheed. However inartfully formulated, his real quarrel was with the government, not his former employer. Lockheed clearly

lacked discretion in the matter, and for McDonald to harass another private party with repeated lawsuits to protest governmental policies is entirely improper as well as unfair. Furthermore, "[m]eritless appeals of this nature are becoming increasingly burdensome on the federal court system." Edwards v. Commissioner, 680 F.2d 1268, 1271 (9th Cir. 1982). McDonald is therefore assessed $1,000 in attorney's fees, to be paid to appellee Lockheed.

Affirmed.